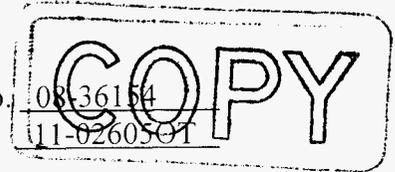


<b>Leon Petroleum, LLC v Carl S. Levine &amp; Assoc., P.C.</b>
2012 NY Slip Op 32913(U)
December 5, 2012
Supreme Court, Suffolk County
Docket Number: 08-36154
Judge: Daniel Martin
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN  
Justice of the Supreme Court

MOTION DATE 5-9-12  
ADJ. DATE 7-31-12  
Mot. Seq. # 002 - MD  
# 003 - MG;CASEDISP

-----X  
LEON PETROLEUM, LLC and ALLEN LEON,

Plaintiffs,

- against -

CARL S. LEVINE & ASSOCIATES, P.C., a/k/a  
CSL HOLDINGS, INC., CARL S. LEVINE,  
ESQ., DECEASED, and THE ESTATE OF  
CARL S. LEVINE,

Defendants.  
-----X

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Upon the following papers numbered 1 to 72 read on these motions in limine and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18, 24 - 56; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 58 - 63, 64 - 65, 66 - 68; Replying Affidavits and supporting papers 21 - 23, 71 - 73; Other memoranda of law 19 - 20, 57, 69 - 70; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that the motion *in limine* by the defendants Carl S. Levine & Associates, P.C., a/k/a CSL Holdings, Inc., Carl S. Levine, Esq., Deceased, and the Estate of Carl S. Levine, for an order excluding certain testimony at trial pursuant to CPLR 4519, the Dead Man's Statute, is denied as moot; and it is further

**ORDERED**, on the Court's own motion, that the complaint is hereby dismissed as against the defendant Carl S. Levine, Esq., Deceased, and it is further

**ORDERED** that the motion by the defendants Carl S. Levine & Associates, P.C., a/k/a CSL Holdings, Inc., and the Estate of Carl S. Levine, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

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This action was commenced to recover damages allegedly sustained by the plaintiffs as the result of the failure of the defendant Carl S. Levine, Esq., Deceased (Levine) to properly draft a contract clause ensuring that the plaintiffs would receive the payment of monies due from the State of New York regarding the condemnation of portions of gas stations which the plaintiff was in the process of purchasing. The complaint in this action originally set forth six causes of action against the defendants. It is undisputed that the plaintiffs withdrew the first three causes of action, and that the Court (Costello, J.) dismissed the fifth and sixth Causes of Action by order dated September 10, 2009. Thus, in determining these motions, the only issue before the Court is the fourth Cause of Action for legal malpractice.

The defendants now move for an order excluding the introduction of certain testimony at trial and for summary judgment dismissing the complaint. The Court will first address the defendants' motion for summary judgment, as this may well determine the issues in the other pending motion. Initially, the Court notes that a plaintiff may not commence a legal action or proceeding against a dead person. Pursuant to EPTL 11-3.2 (a) (1), an action for injury to person or property may only be brought or continued against the personal representative of a decedent.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of their motion, the defendants<sup>1</sup> submit, among other things, the pleadings, the deposition testimony of the plaintiff Allen Leon (Leon) and two non-party witnesses, the so-ordered transcript of the hearing held before the Hon. Ralph F. Costello which resulted in the aforementioned order dated September 10, 2009, the contract of sale between the plaintiff Leon Petroleum, LLC (LPL) and Tartan Corp. (Tartan) for the purchase of Tartan's assets, certain correspondence between LPL and Tartan, and certain orders and documents relating to an action commenced by LPL against Tartan. The Court notes that the defendants also submit the unsigned deposition testimony of a nonparty witness, Diane Moffet (Moffet). The defendants have failed to submit proof that the transcript was forwarded to Moffet for her review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of Moffet is not in admissible form (*see Marmer v IF USA Express, Inc.*, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).

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<sup>1</sup> The Court notes that the plaintiff improperly names the defendant The Estate of Carl S. Levine as a party herein. However, it appears that the action was properly commenced against the personal representative of the decedent pursuant to EPTL 11-3.2 (a) (1).

Stanley Kleinberg (Kleinberg), a nonparty witness, was deposed on October 12, 2011. He testified that he was a co-executor of the estate of Barry Tallering (Tallering), the owner of Tartan, who passed away in 1996. At the time, Leon was the general manager of Tartan. Among other things, Tartan was the owner of approximately 46 gas stations in the metropolitan area. He and his co-executor, Robert Topper (Topper), were also trustees of the trust created by Tallering to operate Tartan after his death. Shortly after Tallering passed, he and Topper began to look for buyers to take over Tartan's business. They received a number of offers, including one from Leon. None of the offers included the transfer of three unpaid condemnation awards which resulted from takings by the State prior to Tallering's death. Kleinberg further testified that it was never the plan to include those unpaid awards in any sale of the business, that the issue was never negotiated, and that he considered the awards to be monies owed to Tartan which would go into Tartan's bank account. He stated that the unpaid awards were not mentioned in the marketing booklet created by Leon, as general manager of Tartan, to solicit offers for the sale of Tartan. He indicated that Tartan entered into a Contract of Sale with LPL which was drafted by Tartan's attorney. Leon and Levine negotiated the terms of the Contract of Sale which did not include the unpaid awards in the schedule of assets to be conveyed to LPL, but did include "boilerplate language" which allowed LPL to claim it was entitled to the unpaid awards. Kleinberg avowed that Leon and Levine never brought the "boilerplate language" to Tartan's attention, and that they did not suggest adding the unpaid awards to the schedule of assets to be conveyed to LPL. He stated that, if Leon had made him aware of the "boilerplate language" he would have crossed it out or, perhaps, negotiated a higher price for the sale of Tartan's assets.

At his deposition, Topper essentially testified to the same facts and circumstances as Kleinberg. He did not remember any conversation in which Leon or Levine raised the issue of the unpaid awards, and he would have insisted on an increase in the price of the sale of Tartan's assets if the unpaid awards were to be included in the sale. He indicated that Leon's knowledge about Tartan's operations were a key element in deciding to sell to him, and that he was surprised when LPL claimed that it was entitled to the unpaid awards after the closing under the Contract of Sale. Topper stated that, as an employee of Tartan, Leon had a duty to reveal the terms of the Contract of Sale to Tartan.

At his deposition, Leon testified that he is the managing member of LPL, which owns and leases gas stations, that he oversees the company's litigation, and that he oversaw the action commenced by LPL against Tartan to recover the unpaid condemnation awards. He stated that LPL was formed to obtain Tartan's assets, that he believed that LPL signed a written retainer with Levine in 1997 or 1998 in which Levine agreed to represent LPL in the purchase of Tartan's assets, and that he had not seen the retainer for many years. In August 1999, LPL acquired the assets of Tartan, including three gas stations which had been previously condemned by New York State (the State). He was led to believe that the Contract of Sale between LPL and Tartan protected LPL's right to acquire the unpaid awards due from the State after the closing under the contract. He indicated that, during the contract negotiations, he spoke with Levine in the late winter/early spring of 1998 about the unpaid awards. Leon further testified that:

"The purchase of the assets of Tartan by Leon Petroleum was a long and convoluted transaction. It actually had its roots in May of 1996. The beneficiaries and heirs, along with the trustees of Tartan

... took thirty-nine months to finish the deal ... As the deal progressed, the real estate deal progressed, the attorneys for Tartan prepared a contract of sale. The contract of sale was approved by [Levine] and myself. And the attorneys and trustees of the Tartan estate then presented the contract to the beneficiaries under the will. A new level of attorneys then surfaced representing the beneficiaries. One of the attorneys ... decided that the contract of sale that we had worked on and that the seller had prepared should be made a rider to a Blumberg form. Approximately ten months or nine months before the closing, the contract that we had been working with became a rider to the Blumberg form. When Carl Levine received the rider back from the seller along with the new Blumberg form attached on the front, he sent me a copy overnight. And the rider that I had been very familiar with because that's what we had been working on all this time. The Blumberg form was new to both [Levine] and myself with regard to this transaction. As soon as I read it, I called [Levine] and made him aware of the unpaid awards verbiage and reminded him that there were the condemnation monies out there and I asked him, is this verbiage sufficient for [LPL] to receive the condemnation awards. He reviewed it and said, we are okay."

He indicated that the language in the Blumberg form did not exist prior to the attachment of that form, and that it was Levine's "direction that he would decide when to make an issue out of it and when not to. And then, as the rider and the Blumberg form came down, allowed it to go through and we were almost home free." Leon acknowledged that he did not alert Tartan to the significance of the language in the Blumberg form. He stated that the awards were necessary to cure the issues that resulted from the condemnations at the three gas stations, that he did not seek a reduced price under the Contract of Sale regarding those issues because he was told that the Blumberg language was adequate to obtain the unpaid awards, and that Levine never recommended that the unpaid awards be listed in the schedule of assets to be conveyed to LPL. Leon further testified that:

"[T]he condemnations had already taken place. Whether or not the award was unpaid at the time of closing, was a day-by-day proposition because at any time it could have been paid. [Levine] and I had our antennas up and watching this as it went along. When the Blumberg form came to pass, that solidified our position. So, it was on our radar screen and we were watching it. We didn't make an initial issue of it because that would cause [Tartan] to then finish up the deal with the State prior to the contract. So, [Levine] designed the interaction with [Tartan] to kind of always avoid that until it was necessary that we address it because we didn't want to alert [Tartan] to the situation."

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Leon indicated that LPL commenced an action against Tartan seeking to recover the unpaid awards after the closing under the Contract of Sale, and that he approved a settlement in that action pursuant to which LPL received approximately one-half of the outstanding award money.

A review of the Contract of Sale reveals that the language at the center of this controversy is contained in section 1.01, which reads in pertinent part:

Seller shall sell to Purchaser, and Purchaser shall purchase from Seller, at the price, and upon the terms and conditions set forth in this contract: ... (c) all right, title and interest of Seller, if any, in and to the land lying in the bed of any street or highway in front of or adjoining the Land to the center line thereof and to any unpaid award for any taking by condemnation or any damage to the Land by reason of a change of grade of any street or highway ...

For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements of a malpractice cause of action (*Napolitano v Markotsis & Lieberman*, 50 AD3d 657, 855 NYS2d 593 [2d Dept 2008]; *Olaiya v Golden*, 45 AD3d 823, 846 NYS2d 604 [2d Dept 2007]; *Caires v Siben & Siben*, 2 AD3d 383, 767 NYS2d 785 [2d Dept 2003]; *Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303, 696 NYS2d 203 [2d Dept 1999]). To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 803 NYS2d 571 [2d Dept 2005]; *Ippolito v McCormack, Damiani, Lowe & Mellon*, *supra*; *Iannarone v Gramer*, 256 AD2d 443, 682 NYS2d 84 [2d Dept 1998]; *Volpe v Canfield*, 237 AD2d 282, 654 NYS2d 160 [2d Dept 1997], *lv denied* 90 NY2d 802, 660 NYS2d 712 [1997]). Here the defendants have established the plaintiffs' inability to prove that they would have been successful in negotiating a better price for the purchase of Tartan's assets, that Tartan would have accepted an express provision conveying the unpaid awards to LPL without an increase in the purchase price under the Contract of Sale, and that Levine failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community.

An attorney's decision to pursue one of several reasonable courses of action does not constitute malpractice even where the attorney's selection of one of several reasonable courses of action, when viewed in hindsight, appears to be an error in judgment ( *see Rosner v Palley*, 65 NY2d 736, 492 NYS2d 13 [1985]; *Dimond v Kazmierczuk & McGrath*, 15 AD3d 526, 790 NYS2d 219 [2d Dept 2005]; *Holschauer v Fisher*, 5 AD3d 553, 772 NYS2d 836 [2d Dept 2004]; *Magnacoustics, Inc., v Ostrolenk, Faber, Gerb, & Soffen*, 303 AD2d 561, 755 NYS2d 726 [2d Dept 2003]). Here, the submission of the defendants established, *prima facie*, that the plaintiffs' cause of action, wherein they claim that Levine's "failure to draft clear, specific, and unambiguous language" to protect their right to the unpaid awards is without merit. The record adduced on the instant motion demonstrated that the plaintiffs charted a course which relied on Levine's choice

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between expressly raising the issue of the awards and risking an increase in the purchase price under the Contract of Sale, or relying on Tartan's language and hoping that an arguable claim to those awards would be sustained.

In addition, the plaintiffs cannot establish as a matter of law that Levine's actions resulted in a loss of one-half of the unpaid awards. In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the breach of the attorney's duty proximately caused the plaintiff actual and ascertainable damages (*see Leder v Spiegel*, 9 NY3d 836, 840 NYS2d 888 [2007]; *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 835 NYS2d 534 [2007]; *McCoy v Fienman*, 99 NY2d 295, 755 NYS2d 693 [2002]; *Darby & Darby, P.C. v VSI Intl Inc.*, 95 NY2d 308, 716 NYS2d 378 [2000]; *Kluczka v Lecci*, 63 AD3d 796, 880 NYS2d 698 [2d Dept 2007]). Moreover, the plaintiff is required to prove that, "but for" the attorney's negligence, the plaintiff would have prevailed on the underlying cause of action (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705 [2007]; *Leder v Spiegel*, *supra*; *Snolis v Clare*, 81 AD3d 923, 917 NYS2d 299 [2d Dept 2011]; *Weil, Gotshalt & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 780 NYS2d 593 [1st Dept 2004]; *Shopsin v Siben & Siben*, 268 AD2d 578, 702 NYS2d 610 [2d Dept 2000]). Thus, the plaintiffs here are required to prove that they would have been entitled to the full amount of the unpaid awards had Levine expressly raised the issue at any time, including after Tartan's attorneys transmitted the Blumberg form to him. The record reveals that the plaintiffs are unable to prove that Tartan would have agreed to anything more than the splitting of those awards set forth in the settlement of LPL'S action against Tartan. Accordingly, the defendants have established their entitlement to summary judgment herein.

Having established their entitlement to summary judgment dismissing the complaint against them, it is incumbent upon the plaintiffs to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, *supra*; *Rebecchi v Whitmore*, *supra*; *O'Neill v Fishkill*, *supra*). In opposition to the motion, the plaintiffs submit, among other things, an affidavit from an expert witness, copies of three briefs submitted in an appeal filed by Tartan in the action brought against it by LPL, and the deposition testimony of Levine. It is well settled that the statements of a decedent are not rendered inadmissible under the "Dead Man's Statute" (*see CPLR 4519*) when offered in opposition to a motion for summary judgment (*see Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1972]; *Miller v Lu-Whitney*, 61 AD3d 1043, 876 NYS2d 211 [3d Dept 2009]; *Lauriello v Gallotta*, 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; *Rosado v Kulsakdinun*, 32 AD3d 282, 284, 820 NYS2d 239 [1st Dept 2006]; *McEvoy v Garcia*, 114 AD2d 401, 494 NYS2d 125 [2d Dept 1985]; *Friedman v Sills*, 112 AD2d 343, 491 NYS2d 794 [2d Dept 1985]).

At his deposition in the action brought by LPL against Tartan, Levine testified that the three condemnations had taken place prior to any offer by Leon to purchase Tartan's assets. He considered the unpaid awards regarding those condemnations to be business assets depending on when the awards were made. He stated that he believed that Tartan always knew that Leon was offering to buy substantially all of Tartan's assets, which included everything not excluded under the Contract of Sale. Levine further testified that he had many conversations with the attorney for Tartan regarding the unpaid awards, that said attorney agreed that Tartan was selling everything except what the parties agreed would not be sold,

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and that Tartan could have changed the Blumberg form language contained in section 1.01 of the Contract of Sale if it so desired.

The plaintiffs submit an expert opinion indicating that Levine clearly departed from the minimum standards of care, skill, knowledge and diligence commonly possessed by the legal profession when he relied on section 1.01 of the Contract of Sale to ensure that the unpaid awards would be conveyed to LPL. In his affidavit dated June 11, 2012, Joseph N. Campolo, Esq. (Campolo) swears that section 1.01 was ambiguous as to whether the parties to the Contract of Sale intended for LPL to receive the condemnation awards, that the Blumberg form “purports to address only a condemnation between point of contract signature and closing ...,” and that there should have been specific language regarding the pre-contract takings. He states that Levine’s failure left LPL vulnerable to Tartan’s arguments in the litigation between LPL and Tartan, resulting in the settlement of that action. Campolo concludes by stating “Accordingly, assuming that it was [Levine’s] intent to obtain those condemnation awards for his client (and both Mr. Levine’s and Mr. Leon [*sic*] depositions establish that it was) I do believe that Mr. Levine was negligent in relying on Section 1.01 and not insisting on specific language related to those awards.

It is well settled that the opinion testimony of an expert “must be based on facts in the record or personally known to the witness” (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 480 NYS2d 195 [1984] *citing Cassano v Hagstrom*, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; *Santoni v Bertelsmann Property, Inc.*, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert “may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion” (*see Shi Pei Fang v Heng Sang Realty Corp. supra*). Here, Campolo has failed to address the testimony of all of the witness, including Leon, which indicate that the issue of the condemnation awards was intentionally avoided by LPL and its counsel. Neither does Campolo address the impact on the negotiations between LPL and Tartan if specific language had been requested, and whether Levine’s alleged failure was the proximate cause of any damages suffered by LPL.

A review of the plaintiffs’ submission in the light most favorable to them reveals that they have failed to raise an issue of fact requiring a trial in this action. Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore, supra*).

Accordingly, the defendants’ motion for summary judgment is granted, the complaint is dismissed, and the defendants’ motion *in limine* is denied as moot.

Dated: DECEMBER 5, 2012.

Joseph N. Campolo  
 J.S.C.

  X   FINAL DISPOSITION

       NON-FINAL DISPOSITION